THE HONORABLE MARSHA J. PECHMAN

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2 3 4 5	WILLIAM TAMAYO, REGIONAL ATTORN EQUAL EMPLOYMENT OPPORTUNITY C SAN FRANCISCO DISTRICT OFFICE 450 GOLDEN GATE AVENUE, POB 36025 SAN FRANCISCO, CA 94102		
6 7 8 9	John F. Stanley, Supervisory Trial Attorney Damien Lee, Senior Trial Attorney Equal Employment Opportunity Commission 909 First Avenue, Suite 400 Seattle, WA 98104 TEL: (206) 220-6915 FACSIMILE: (206) 220-6911 Damien.Lee@eeoc.gov		
11	ATTORNEYS FOR PLAINTIFF EEOC		
12 13 14 15 16	IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE		
17 18 19 20	EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff	CIVIL ACTION NO. 2:14-cv-01488-MJP FIRST AMENDED COMPLAINT	
21 22 23	v. BNSF RAILWAY CO., Defendant.	JURY TRIAL DEMAND	
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FIRST AMENDED COMPLAINT - Page 1 of 8

EQUAL EMPLOYMENT
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NATURE OF THE ACTION

This is an action under Title I of the Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, 42 U.S.C. § 12101 *et. seq.*, ("ADA" and "ADAAA") to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Russell Holt, who was adversely affected by such practices. The Equal Employment Opportunity Commission alleges that BNSF Railway Co. ("Defendant" or "BNSF") discriminated against Mr. Holt, a qualified individual with a disability, when it failed to hire Mr. Holt for a senior patrol officer position ("Patrol Officer" or "subject position") because of his record of disability or because Defendant regarded him as being disabled.

JURISDICTION AND VENUE

- 1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12117(a), which incorporate by reference Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) and (3) ("Title VII"), and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.
- 2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the Western District of Washington.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of Title I of the ADA and is expressly authorized to bring this action by Section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. 2000e-5(f)(1).

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- 4. At all relevant times, Defendant has continuously been doing business in the State of Washington and has continuously had at least 15 employees.
- 5. At all relevant times, Defendant has continuously been an employer engaged in an industry affecting commerce under Section 101(5) of the ADA, 42 U.S.C. § 12111(5), and Section 101(7) of the ADA, 42 U.S.C. § 12111(7), which incorporates by reference Sections 701(g) and (h) of Title VII, 42 U.S.C. §§ 2000e(g) and (h).
- 6. At all relevant times, Defendant has been a covered entity under Section 101(2) of the ADA, 42 U.S.C. § 12111(2).

STATEMENT OF CLAIMS

- 7. More than thirty (30) days prior to the institution of this lawsuit, Charging Party Russell Holt ("Mr. Holt") filed a charge with the EEOC alleging violations of Title I of the ADA by Defendant. All conditions precedent to the institution of this lawsuit have been fulfilled.
- 8. Since at least October 2011, Defendant has engaged in unlawful employment practices at its Seattle, Washington facility, in violation of Sections 102(a), 102(b)(6) and 102(d)(3) of Title I of the ADA, 42 U.S.C. §§ 12112(a), 12112(b)(6) and 12112(d)(3). The Defendant discriminated against Russell Holt when it failed to hire him for a Patrol Officer position located in Seattle, Washington because of his disability, in violation of Sections 102(a), 102(b)(6) and 102(d)(3) of the ADA. Mr. Holt is qualified for the Patrol Officer position because he had previously been in law enforcement for eleven years and had performed all of the essential functions of similar jobs successfully and without any accommodation.
- 9. Mr. Holt is an individual with a record of a disability. He was diagnosed in 2007 as having a bulging lumbar disc with a disc extrusion. This permanent musculoskeletal injury substantially limited several of his major life activities for the remainder of 2007 including running and walking. Despite receiving regular medical treatment in 2007 for his permanent physical impairment, Mr. Holt did not miss any work from his law enforcement job in 2007

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because of his back injury. Mr. Holt received follow up treatment for his permanent physical impairment in 2009, but did not miss any work from his law enforcement job in 2009. In fact, Mr. Holt qualified for a more physically arduous SWAT/emergency response team with his employer from 2009 to 2011.

- 10. Mr. Holt applied for a Patrol Officer position with BNSF in Seattle, Washington in June 2011, was interviewed by BNSF's Security Chief in September 2011, and received a conditional offer. Mr. Holt disclosed his permanent musculoskeletal back injury to BNSF after receiving the conditional offer for the subject position. Shortly thereafter, BNSF required Mr. Holt to undergo and pass a number of tests, including a drug test, a background investigation, a psychological evaluation, an isokinetic physical strength test, and a pulmonary function test. Mr. Holt passed each of the foregoing tests. Mr. Holt also provided BNSF with a letter from his treating doctor that indicted he had treated Mr. Holt for back pain, but that his back pain has resolved. After examining him in person and despite knowing about his prior back injury, a BNSF contract doctor medically approved Mr. Holt to start in the senior patrol officer position in October 2011.
- Officer position, BNSF's medical unit in Texas requested more information from him in November 2011, including an MRI. Mr. Holt informed BNSF in November 2011 that his back had been asymptomatic since 2009, his own treating doctor would not approve a new MRI because it was medically unnecessary, and that he would therefore have to bear the cost of this MRI himself. BNSF's medical unit refused to waive the requirement that he provide an MRI at his own cost, and indicated that there was still no guarantee that he would be approved to start in the subject position even if he provided an MRI at his own cost, and that he would have to submit the MRI in a short period of time or their offer would be rescinded. BNSF then rescinded its conditional offer to Mr. Holt on December 14, 2011. Defendant made the decision not to hire

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Mr. Holt on the basis of his disability without showing that the criteria it used to deny him employment was related to the subject position and consistent with job necessity.

- 12. In addition, Defendant regarded Mr. Holt as having a disability in that Defendant failed to hire him because of his permanent musculoskeletal impairment, a bulging lumbar disc with at least one extrusion. BNSF believed that Mr. Holt had a heightened risk of injury in the subject position as of 2011 because of his bulging lumbar disc and disc extrusion, subjected him to an additional medical examination because of that belief, and then denied him employment as a result.
- 13. Defendant did not require all entering employees to provide an MRI at the entering employee's cost even though it required Mr. Holt do so. For example, BNSF hired an individual for the senior patrol officer position in Seattle, Washington in or about January 2012 after it withdrew the conditional offer to Mr. Holt. The individual who Defendant hired as a senior patrol officer in Seattle, Washington in January 2012 did not disclose any prior back injury and BNSF did not require him to provide an MRI at his cost in order to start in the senior patrol officer position.
- 14. The effect of the practices complained of in paragraph 8-13 above has been to deprive Mr. Holt of equal employment opportunities and otherwise adversely affect his status as an employee.
- 15. The unlawful employment practices complained of in paragraph 8-13 above were and are intentional.
- 16. The unlawful employment practices complained of in paragraphs 8 13 above were done with malice or with reckless indifference to the federally protected rights of Russell Holt.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

- A. Grant a permanent injunction enjoining Defendant, its officers, agents, successors, assigns, and all persons in active concert or participation with it, from unlawfully failing to provide equal employment opportunities to applicants for employment and employees with disabilities and to accommodate applicants' and employees' disabilities, and any other employment practice which discriminates on the basis of disability.
- B. Order Defendant to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.
- C. Order Defendant to make whole Mr. Holt by providing appropriate back pay and front pay with interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices.
- D. Order Defendant to make whole Mr. Holt by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in paragraphs 8-13 above, including past and future out-of-pocket losses, in amounts to be determined at trial.
- E. Order Defendant to make whole Mr. Holt by providing compensation for past and future non-pecuniary losses resulting from the unlawful practices complained of in paragraphs 8-13 above, including emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts to be determined at trial.
- F. Order Defendant to pay Mr. Holt punitive damages for its malicious and reckless conduct, as described in paragraphs 8-13 above, in amounts to be determined at trial.
- G. Grant such further relief as the Court deems necessary and proper in the public interest.
 - H. Award the Commission its costs of this action.

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1	JURY TRIAL DEMAND	
2	The Commission requests a jury trial on all questions of fact raised by its	
3 4	complaint.	
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6	DATED this 17h day of November, 2014.	
7 8	WILLIAM R. TAMAYO Regional Attorney	P. DAVID LOPEZ General Counsel
9	JOHN F. STANLEY Supervisory Trial Attorney	JAMES L. LEE Deputy General Counsel
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4	BY: <u>/s/William R. Tamayo</u> EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2014, I electronically filed the forgoing "EEOC'S FIRST AMENDED COMPLAINT" with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following individuals listed below:

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Attorneys for Defendant BNSF Railway Co.

DATED this 17th day of November, 2014.

/s/ Damien A. Lee
DAMIEN A. LEE
Senior Trial Attorney

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